UNITED
NATIONS

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Security Council

Distr.
GENERAL

S/AC.26/1996/5
18 December 1996

Original: ENGLISH

UNITED NATIONS
COMPENSATION COMMISSION
GOVERNING COUNCIL

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EXECUTIVE SUMMARY OF THE REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS APPOINTED TO REVIEW THE WELL BLOWOUT CONTROL CLAIM (THE "WBC CLAIM")

GE.96-64795

Introduction

1. On 30 July 1993, KUWAIT OIL COMPANY (K.S.C.) ("KOC" or the "Claimant") filed with the United Nations Compensation Commission (the "UNCC" or the "Commission") a claim referred to by the Claimant as the "Well Blowout Control Claim" (the "WBC Claim"). In this claim, which was submitted on a category "E" (corporate) claim form, the Claimant seeks compensation in the amount of US$951,630,871 for the costs allegedly incurred in:

a. the planning for the work anticipated on the return of the oil fields of Kuwait to KOC;

b. the work performed to extinguish the well-head fires that were burning upon the withdrawal of Iraqi forces from Kuwait;

c. the initial sealing of the wells to stop the flow of oil and gas; and

d. the making safe of the wellheads so that work on the reinstatement of production could be started.

2. The work described above is referred to by the Claimant as the "Well Blowout Control ('WBC') Exercise."

3. The Claimant's initial submission consists of five volumes of documents, including an accountants' report prepared by Touche Ross (the "Accountants"), and a videotape. This documentation is only a fraction of the documentation underlying the WBC Claim. The Claimant explains that, potentially, the whole of the documentation that could be submitted in support of the WBC Claim is vast and could not feasibly be dealt with other than on a computerized basis.

4. At its sixteenth session, on 22 March 1995, the Governing Council of the Commission (the "Governing Council") appointed a Panel of Commissioners composed of Mr. Allan Philip as Chairman and Messrs. Bola A. Ajibola and Antoine Antoun as Commissioners (the "Panel") to review the WBC Claim. The present document provides an executive summary of the report and recommendations to the Governing Council by the Panel so appointed, pursuant to article 38 (e) of the Provisional Rules for Claims Procedure (the "Rules") (S/AC.26/1992/10).1/ The full text of the Panel's report and recommendations is annexed hereto for further reasoning and explanation.

I. PROCEEDINGS

5. In view of the complexity of the issues raised, the volume of documentation underlying the Claim and the amount of compensation sought by the Claimant, the Panel in its first Procedural Order of 27 November 1995 classified the WBC Claim as an unusually large or complex claim within the meaning of article 38 (d) of the Rules. The Panel also invited the Claimant to respond to extensive interrogatories by the Panel, and requested the Government of the Republic of Iraq ("Iraq") to submit its response to the Statement of Claim and related documentation.

6. Further Procedural Orders were issued by the Panel on 14 May, 3 July and 2 August 1996, whereby the Panel requested supplemental submissions, documents and information from the Claimant and Iraq. Pursuant to a decision by the Panel, an on-site inspection was performed in Kuwait by a verification team from 12 through 17 July 1996. The purpose of the on-site inspection was to review the accounts, invoices and other documentation underlying the WBC Claim that had not been submitted to the Commission.

7. The Panel conducted oral proceedings from 29 July through 1 August 1996. Iraq attended the proceedings as "observers under protest" until 31 July 1996. On that date, the Panel issued a Procedural Ruling denying Iraq's request, submitted immediately prior to the oral proceedings, to postpone the oral proceedings and to grant Iraq additional time to prepare its legal defense in the WBC Claim. After the Panel's ruling, Iraq no longer availed itself of the opportunity of attending the oral proceedings.

8. Subsequent to the oral proceedings the Claimant amended the WBC Claim, which resulted in a reduction of the amount claimed by US$915,209. Accordingly, the WBC Claim as amended amounts to US$950,715,662.

II. FACTS AND CONTENTIONS

9. KOC is a wholly-owned subsidiary of Kuwait Petroleum Corporation ("KPC"). As the operating company of Kuwait's public oil sector, KOC is responsible for the maintenance and development of the oil fields and for all crude oil and gas production in Kuwait. KPC, the shares of which are wholly owned by the State of Kuwait, is responsible for the coordination of Kuwait's entire public sector oil and gas industry and is the holding company of all other companies operating in the oil and petrochemical sector.

10. According to the Claimant, after Iraq's invasion and occupation of Kuwait on 2 August 1990 a crisis team was established in London, the United Kingdom, consisting of members of the senior management of Kuwait's oil sector. The Claimant states that the team soon became aware that Iraqi forces were placing explosives around the oil installations in Kuwait and in particular around wellheads. A plan called "Al-Awda" was devised to cope with the anticipated destruction of the oil sector. The WBC Exercise was one of the priorities of this plan.

11. Negotiations were started with various firefighting and support services companies to contract for the services required. A contract was also entered into with the international engineering company Bechtel Limited ("Bechtel"). Under the contract Bechtel agreed to manage the entire Al-Awda project and provide a variety of other services.

12. The Claimant states that, upon the withdrawal of the Iraqi forces from Kuwait, out of a total of 914 operational wells in Kuwait, 798 wellheads had been detonated by the Iraqi forces, of which 603 were on fire, 45 were gushing oil but not on fire, and 150 although damaged were neither on fire nor gushing oil. Because the number of wells detonated was higher than anticipated, the firefighting effort was expanded to include some 27 firefighting teams from the United States, Canada, Iran, Romania, Hungary, the Soviet Union, France, the United Kingdom, China and Kuwait.

13. The last well-head fire was extinguished on 6 November 1991, eight months after the liberation of Kuwait. Thereafter, the Al-Awda project was redesignated the "Al-Tameer" (the "Rebuilding") project, which continued the work of Al-Awda and took it beyond the WBC stage into the rebuilding and reconstruction stage. The bulk of the costs incurred in the reconstruction effort are covered by other claims filed by KOC, including the Physical Assets and Related Damage Claim (the "Physical Assets Claim").

14. Iraq denies any responsibility for the oil-well fires, asserting that the fires were caused by allied bombing. According to Iraq, the alleged allied bombing broke the chain of causation between Iraq's invasion and the oil fires, thus rendering the resulting losses indirect. In this connection, Iraq also challenges the probative value of the documentation provided by the Claimant as well as the credibility of the Claimant's witnesses. On the merits, Iraq objects to the Claim on a number of financial and technical grounds.

III. PRELIMINARY ISSUES

15. The issue arose in the course of the proceedings as to whether the WBC Claim can properly be categorized as a category "E" (corporate) claim. This issue and the related issue of the Claimant's standing to pursue the WBC Claim are considered by the Panel as preliminary issues.

16. With regard to the proper categorization of the WBC Claim, the Panel finds that the categorization of a claim as a category "E" or "F" claim does not entail any substantive consequences in terms of the law to be applied. Consequently, the fact that the WBC Claim has been submitted on a category "E" (corporate) claim form does not preclude the applicability of the criteria listed under section III of Governing Council decision 7, entitled "Criteria for processing claims of governments and international organizations" (S/AC.26/1991/7/Rev.1). These criteria specifically provide for the compensability of "expenses directly relating to fighting oil fires."

17. The Claimant acknowledged in the course of the proceedings that the WBC Exercise was funded by the Ministry of Oil, raising the issue as to whether KOC is the proper party to assert the Claim. The Panel finds that this issue is to be resolved in light of the structure of Kuwait's public oil sector as a whole, taking into account the respective roles of the companies operating therein and the additional information provided by the Claimant in the course of the proceedings. The Panel concludes that the WBC Claim must be deemed to have been made by KOC on behalf of Kuwait's public oil sector as a whole and that, consequently, both the Government of Kuwait and KPC will be bound by the decision to be rendered by the UNCC in this matter and thus will be estopped from bringing the same claim before the UNCC.

IV. LEGAL FRAMEWORK

18. The law to be applied by the Commission is set out in article 31 of the Rules. According to article 31, such law includes Security Council resolution 687 (1991), in which the Security Council determined, acting under Chapter VII of the United Nations Charter, that Iraq is "liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."

19. The decisions of the Governing Council further define the scope of Iraq's liability. Section III of Governing Council decision 7 specifically provides for the compensability of "expenses directly relating to fighting oil fires." As noted above, the fact that section III deals with claims by governments and international organizations does not, in the Panel's view, mean that the criteria contained therein cannot be applied to category "E" claims. Furthermore, under paragraph 21 of Governing Council decision 7, a compensable loss "include[s] any loss suffered as a result of . . . [m]ilitary operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991." (Emphasis added.)

20. Based on the evidence and testimony presented, the Panel finds that, although part of the damage for which compensation is being sought in the WBC Claim may be a result of the allied bombing, the bulk of the oil-well fires were directly caused by the explosives placed on the wellheads and detonated by Iraqi armed forces. The evidence referred to by Iraq is consistent with this conclusion. In any event, under paragraph 21 of Governing Council decision 7, Iraq's liability includes any loss suffered as a result of military operations by either side. Iraq's contention that the allied air raids broke the chain of causation therefore cannot be upheld.

21. Having reached the above conclusions, the Panel's task in the present proceedings is twofold. First, the Panel must determine whether all the costs for which compensation is being sought in the WBC Claim can be considered to be the direct result of Iraq's invasion and occupation of Kuwait. Second, the Panel must verify, using expert advice where necessary, that such costs have in fact been incurred by the Claimant in the execution of the WBC Exercise.

V. SUBSTANTIVE ANALYSIS

22. The WBC Claim as amended by the Claimant can be analyzed as follows:

KOC costs	Amount (US$)
International firefighting and support services contractors	206,879,412
Post capping	25,654,763
Sundries	10,068,708
Total	242,602,883

KOC - Al-Awda costs	Amount (US$)
Direct costs	
Firefighter support	52,392,745
Construction equipment	293,462,100
Ancillary costs	
Project management and related services	145,839,509
Support facilities	120,958,852
Freight	65,791,081
Communications	26,422,306
Jebel Ali staging area	3,246,186
Total	708,112,779

23. KOC costs are defined by the Accountants as "costs incurred by KOC and recorded on the accounting system maintained by KOC Financial Services Department." KOC - Al-Awda costs are defined as "costs associated with the Al-Awda project that were recorded by Bechtel as project managers, on the KOC - Al-Awda system. These are all paid by KOC but the difference between these and other KOC costs is that these are recorded within the Al-Awda project and details transferred to the KOC ledgers."

24. The Claimant states that, generally, the WBC Claim includes all costs "incurred in connection with the preparation for, and the execution of, the WBC Exercise provided that they were paid by 31 July 1992, except in the case of post-capping costs, which have been included, irrespective of the time of payment, provided that they were recorded by KOC's accounting department by 30 September 1992."

25. The costs incurred in the WBC Exercise include revenue expenditure as well as capital expenditure. The total amount sought by the Claimant, US$950,715,662, consists of revenue expenditure in the amount of US$646,809,000 and of capital expenditure in the amount of US$303,907,000. The latter figure represents the full cost of capital items purchased in the period covered by the WBC Claim. The Claimant states that these items continued to be used in the reconstruction project and that their residual value would be calculated at a later stage and reflected in KOC's Physical Assets Claim. Accordingly, no allowance was made by the Claimant to reflect any residual value of these items as at the end of the WBC Exercise.

26. Although the Panel finds that a certain amount of capital expenditure is appropriately included in the WBC Claim, this does not necessarily mean that all of the capital expenditure can properly be verified and, consequently, is fully compensable in the context of this Claim. While the Claim file contains information that enables the Panel to verify the purpose for which the capital assets in question were used during the period covered by the Claim, the Panel is not in a position to verify for which purpose these assets were used after that period. The documentation that would enable the Panel to perform such verification is presented in KOC's Physical Assets Claim and thus is not before this Panel, which was appointed to review the WBC Claim only.

27. The Panel concludes that, based on the entire time period during which the capital assets in question were used, 22 per cent of the total value of such assets, amounting to US$66,859,457, can be verified in the present Claim. The remaining portion, US$237,047,168, is to be allocated to KOC's Physical Assets Claim as these costs cannot properly be verified in the present Claim.

28. The Claimant explains that with regard to the ancillary (or common) costs, "it was impossible to know precisely what costs were attributable to the WBC exercise, as distinct from reinstatement of KOC's operating facilities." Consequently, instead of attempting to allocate the common costs between the WBC Claim and other claims, the Claimant included in the WBC Claim, with minor exceptions, the KOC - Al-Awda costs that were committed to before 30 November 1991 and that were paid for by 31 July 1992.

29. The Panel agrees that the KOC - Al-Awda costs recorded under the headings "Firefighter support" and "Construction equipment" are properly classified as "direct" costs, or costs attributable almost exclusively to the firefighting effort. With regard to the ancillary (or common) KOC - Al-Awda costs, the Panel is not in a position to determine whether the costs incurred in projects undertaken by the Claimant concurrently with the WBC Exercise are compensable and, if so, to what extent. In these circumstances the Panel determines that 80 per cent of the common KOC - Al-Awda costs are to be verified in the WBC Claim. It follows that the remaining 20 per cent is to be allocated to KOC's other claims as these costs cannot properly be verified in the present Claim. Certain KOC costs are also to be considered as common costs and allocated accordingly.

30. To the extent that the costs claimed in the WBC Claim can be verified in the present proceedings, the Panel is satisfied, based on the evidence

before it and the verification procedures employed, that these costs have in fact been incurred by the Claimant. The Panel also notes that appropriate procedures, such as competitive tendering, the requirement of KOC approval for purchases made through Bechtel, and accounting and cost control systems were employed by the Claimant to control the costs and to keep them at a reasonable level in the extraordinary circumstances prevailing in Kuwait in the aftermath of the Gulf War.

VI. QUANTIFICATION OF THE CLAIM

A. KOC costs

31. The total amount claimed under this heading, US$242,602,883, contains capital expenditure in the amount of US$25,991,055. Applying the standard described in paragraph 27, supra, relating to the allocation of capital expenditure, the Panel concludes that 78 per cent of this figure, amounting to US$20,273,023, is to be allocated to KOC's Physical Assets Claim as it represents costs that cannot properly be verified in the present Claim.

32. Certain cost items claimed under the heading "Sundries" are to be treated as costs common to the various activities undertaken by the Claimant contemporaneously with the WBC Exercise. Consequently, 20 per cent of these costs, amounting to US$783,592, must be allocated to KOC's other claims as they cannot properly be verified in the present Claim.

33. The claim for the costs incurred in connection with the work performed by KOC's own firefighting team is rejected. In the absence of any further details by the Claimant regarding the precise nature of these payments, it appears to the Panel that the Claimant would have had to make such salary payments even if there had been no invasion.

34. The Panel concludes that costs claimed under the heading "KOC costs" in the total amount of US$218,741,878 have been incurred in the execution of the WBC Exercise and are compensable as loss, damage or injury sustained by the Claimant as a direct result of Iraq's invasion and occupation of Kuwait.

B. KOC - Al-Awda costs

35. The total amount claimed under the present heading, US$708,112,779, includes capital expenditure in the amount of US$277,915,570. Applying the standard relating to the allocation of capital expenditure, the Panel determines that 78 per cent of this amount, or US$216,774,145, is to be

allocated to KOC's Physical Assets Claim as it represents costs that cannot properly be verified in the present Claim. In view of their nature, the costs claimed under the heading "Freight" are to be treated like capital expenditure.

36. Applying the standard applicable to common costs, the Panel determines that 20 per cent of such costs are to be allocated to KOC's other claims as costs that cannot properly be verified in the present Claim. This allocation, which affects amounts claimed under the headings "Project management and related services," "Support facilities," "Communications" and "Jebel Ali staging area," totals US$47,470,487.

37. The Panel notes that under the heading "Support facilities" the Claimant seeks compensation for costs incurred in removing unexploded ordnance during the period covered by the WBC Claim. Because the Claimant has filed a separate claim with the UNCC for the remainder of such costs, any determination by the Panel in the present Claim would necessarily prejudge the other claim. In view thereof, the Panel determines that these costs are to be allocated to the appropriate claim as they cannot properly be verified in the present Claim.

38. The Panel concludes that the costs claimed under the heading "KOC - Al-Awda costs" in the total amount of US$391,556,669 have been incurred in the execution of the WBC Exercise and are compensable as loss, damage or injury sustained by the Claimant as a direct result of Iraq's invasion and occupation of Kuwait.

C. Wafra

39. The Panel notes that the reduction made by the Claimant in respect of costs incurred in fighting fires in the Wafra oil field consists solely of direct firefighting costs and does not include costs incurred in supporting the firefighting effort in the area. See paragraph 8, supra.

40. In the Panel's view, the compensability of indirect costs is necessarily linked to the compensability of the direct costs to which they relate. Consequently, under the legal arrangements applicable to the Wafra oil field, the Panel determines that the indirect costs allocable to Wafra, in the estimated amount of US$250,000, are not compensable.

D. Summary

41. The Panel determines that the loss, damage or injury for which compensation is being sought in the WBC Claim is compensable in this Claim in the amount of US$610,048,547. The Panel's findings are summarized in the table below.

Analysis	KOC costs (US$)	KOC - Al-Awda costs (US$)	Global determinations (US$)	Amount (US$)
Amount claimed	243,519,092	708,112,779	-	951,630,871
Amendment	(915,209)	-	-	(915,209)
Rejections				
KOC firefighting team	(2,804,390)	-	-	(2,804,390)
Wafra indirect costs	-	-	(250,000)	(250,000)
Allocations				
Capital expenditure	(20,273,023)	(216,774,145)	-	(237,047,168)
Common costs	(783,592)	(47,470,487)	-	(48,254,079)
Freight	-	(51,317,043)	-	(51,317,043)
Ordnance clearance	-	(994,435)	-	(994,435)
Total	218,741,878	391,556,669	(250,000)	610,048,547

VII. INCIDENTAL ISSUES

42. The bulk of the costs claimed in the WBC Claim were incurred in United States dollars. Thus, these costs do not raise any currency exchange rate issues. With regard to the exchange rates used by the Claimant to convert costs incurred in Kuwaiti dinars, or in currencies other than Kuwaiti dinars, the Panel finds that those rates constitute reasonable approximations of the applicable market rates prevailing at the relevant times.

43. Under Governing Council decision 16, "Awards of interest" (S/AC.26/1992/16), "[i]nterest will be awarded from the date the loss occurred until the date of payment." The Panel finds that the "date" the loss occurred coincides with the period during which the relevant payments were made. Given that the costs forming the subject matter of the WBC Claim were incurred more intensively towards the end of the relevant

period, the Panel determines that 15 October 1991 be considered as the date the loss occurred for purposes of interest calculation.

44. The Panel notes that the Claimant does not seek claim preparation costs at the present time. Thus, the Panel finds no reason to pronounce itself on the issue.

VIII. RECOMMENDATIONS

45. In view of the foregoing, the Panel makes the following recommendations:

a. The Claimant KUWAIT OIL COMPANY (the "Claimant"), on behalf of Kuwait's public oil sector as a whole, is to be paid the amount of US$610,048,547 as compensation for the costs incurred in the execution of the Well Blowout Control Exercise as a direct result of Iraq's invasion and occupation of Kuwait;

b. The Claimant, on behalf of Kuwait's public oil sector as a whole, is to be paid interest on the principal amount specified in paragraph 45 (a), supra, as of 15 October 1991, pursuant to Governing Council decision 16;

c. The claim for the costs incurred in connection with the work performed by the Claimant's own firefighting team, in the amount of US$2,814,390, is rejected;

d. The claim for the indirect costs incurred in fighting oil-well fires in the Wafra oil field, in the amount of US$250,000, is rejected;

e. The Claimant may amend its Physical Assets and Related Damage Claim, filed with the UNCC on 27 June 1994, to include 78 per cent of capital expenditure claimed in the present Claim, in the amount of US$237,047,168, which amount cannot properly be verified in the present Claim;

f. The Claimant may amend its Physical Assets and Related Damage Claim, referred to in paragraph 45 (e), supra, to include 78 per cent of KOC - Al-Awda costs claimed under the heading "Freight," in the amount of US$51,317,043, which amount cannot properly be verified in the present Claim;

g. The Claimant may amend its other claims, identifying such claims and the amount to be allocated to each such claim, to include 20 per cent of common KOC costs claimed under the headings "Sundries/Legal costs" and "Sundries/Consulting costs" and common KOC - Al-Awda costs claimed under the headings "Project management and related services," "Support facilities," "Communications" and "Jebel Ali staging area," in the total amount of US$48,254,079, which amount cannot properly be verified in the present Claim; and

h. The Claimant may amend its Removal of Unexploded Ordnance Claim, filed with the UNCC on 30 July 1993, to include the KOC - Al-Awda costs relating to the removal of unexploded ordnance claimed under the heading "Support facilities," in the amount of US$994,435, which amount cannot properly be verified in the present Claim.

Geneva, 15 November 1996

(Signed) Mr. Allan Philip
Chairman

(Signed) Mr. Bola A. Ajibola
Commissioner

(Signed) Mr. Antoine Antoun
Commissioner

Note

1/ This executive summary has been prepared to address the concerns expressed by the Governing Council at its eighteenth session on 11 October 1995 regarding the costs of translation of the texts of the Commissioner Panels' reports and recommendations into the official United Nations languages.